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No. 08-1065

IN THE

Supreme Court of the United States

POTTAWATTAMIE COUNTY, IOWA,
JOSEPH HRVOL, AND DAVID RICHTER,
Petitioners,

v.

TERRY J. HARRINGTON
AND CURTIS W. MCGHEE JR.,
Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* AND BRIEF OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AND NATIONAL DISTRICT ATTORNEYS ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814

Thomas C. Goldstein
(Counsel of Record)
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

MOTION OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AND NATIONAL DISTRICT ATTORNEYS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

Pursuant to Rule 37.2 of the Rules of this Court, the National Association of Assistant United States Attorneys and the National District Attorneys Association hereby move for leave to file the accompanying brief as *amici curiae* in support of petitioners.

The National Association of Assistant United States Attorneys is the voice of Assistant United States Attorneys in the Department of Justice and Congress, helping to safeguard justice and promote the interests of AUSAs. It was founded in 1993 to protect, promote, foster and advance the mission of AUSAs and their responsibilities in promoting and preserving the Constitution of the United States, encouraging loyalty and dedication among AUSAs in support of the Department of Justice, and encouraging the just enforcement of laws of the United States. It is the "bar association" for the more than 5400 AUSAs throughout the country and the U.S. territories.

The National District Attorneys Association (NDAA) is the largest and primary professional association of prosecuting attorneys in the United States. The association has approximately 7000 members, including most of the nation's local prosecutors, assistant prosecutors, investigators, victim witness advocates, and paralegals. The

association's mission is "[t]o be the voice of America's prosecutors and to support their efforts to protect the rights and safety of the people." NDAA provides professional guidance and support to its members, serves as a resource and education center, produces publications, and follows public policy issues involving criminal justice and law enforcement. NDAA also files *amicus* briefs on issues relevant to its members and mission, including briefs in this Court in *Van de Kamp v. Goldstein*, 129 S. Ct. 855 (2009), and *Davis v. Washington*, 547 U.S. 813 (2006).

This motion is necessary because respondents' counsel have refused consent to the timely written request for consent to the filing of this brief.

Respectfully submitted,

Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814

Thomas C. Goldstein
(Counsel of Record)
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

TABLE OF CONTENTS

MOTION OF THE NATIONAL ASSOCIATION OF ASSISTANT UNITED STATES ATTORNEYS AND NATIONAL DISTRICT ATTORNEYS ASSOCIATION FOR LEAVE TO FILE A BRIEF AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS i

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT 1

ARGUMENT 2

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Brady v. Maryland,
373 U.S. 83 (1963) 7

Clanton v. Cooper,
129 F.3d 1147 (10th Cir. 1997) 2

Fox v. Tomczak,
No. 04 C 7309, 2006 WL 1157466 (N.D. Ill. Apr. 26, 2006) 3

Giglio v. United States,
405 U.S. 150 (1972) 7

Imbler v. Pachtman,
424 U.S. 409 (1976) 4, 5, 6, 8

Iowa S. Ct. Att'y Disciplinary Bd. v. Barry,
No. 08-1214, 2009 WL 415528 (Iowa Feb. 20, 2009) 10

Iowa S. Ct. Att'y Disciplinary Bd. v. Borth,
728 N.W.2d 205 (Iowa 2007) 10

Koubriti v. Convertino, No. 07-13678, 2008 U.S. Dist. LEXIS 107423 (E.D. Mich. Dec. 3, 2008) 3

Pearson v. Reed,
44 P.2d 592 (Cal. App. 1935) 5

Richir v. Village of Fredonia, N.Y.,
No. 05-CV-076, 2008 U.S. Dist. LEXIS 54012 (W.D.N.Y. July 14, 2008) 3

Tate v. Grose,
412 F. Supp. 487 (E.D. Pa. 1976) 4

United States v. Hasting,
461 U.S. 499 (1983) 6, 7

Weinstein v. Mueller,
563 F. Supp. 923 (N.D. Cal. 1982) 4

Zahrey v. Coffee,
221 F.3d 342 (2d Cir. 2000) 3

Other Authorities

Bill Moushey, *He's Free After 4 Hard Years*, Pittsburgh Post-Gazette, Dec. 2, 2006, at A1 . 10, 11

Br. *Amicus Curiae* of U.S., *Van de Kamp v. Goldstein* (No. 07-854) 7

Dee J. Hall, *Clash of Lawyers Coming To A Head*, Wis. St. J., July 8, 2007, at A1 10

Del Quentin Wilber, *6 Prosecutors No Longer Part Of Legal Team in Stevens Case*, Wash. Post, Feb. 18, 2009, at A6 12

Eric Lichtblau, *Ex-Prosecutor In Terror Inquiry Is Indicted*, N.Y. Times, Mar. 30, 2006, at A18 12

John Stevenson, *Nifong May Be Ouster No-Show*, Durham Herald-Sun, June 28, 2007, at A1 ..... 10, 11

Mike Scarcella, *Sealed Court Records, Transcripts Released in Stevens Case*, The BLT: The Blog of Legal Times, Feb. 18, 2009 12

U.S. Dep't of Justice, Office of Professional Responsibility Annual Report: 2005 7

U.S. Dep't of Justice, *Office of Professional Responsibility, available at* www.usdoj.gov/opr/ 8

Rules

FED. R. CRIM. P. 16 7

IOWA CT. R. 32.3.8(a) 9

IOWA CT. R. 32.3.8(d) 9
IOWA CT. R. 34.1 9
IOWA CT. R. 34.11 10
IOWA CT. R. 34.5 10
IOWA CT. R. 35.9 10
IOWA CT. R. 36.16 10

INTEREST OF *AMICI CURIAE*[1]

The National Association of Assistant United States Attorneys and the National District Attorneys Association submit this *amici curiae* brief in support of petitioners Pottawattamie County, Iowa, Joseph Hrvol, and David Richter. The interests of the *amici* are set out in the accompanying motion.

SUMMARY OF ARGUMENT

Certiorari is warranted because the question presented raises an important issue that is already the frequent subject of litigation, and which is even more likely to be frequently litigated if the decision below is permitted to stand. The prospect that prosecutors will face litigation and potential liability imposed by civil damages over the conduct of their official duties will chill prosecutorial efforts that are necessary to combat and deter crime. The increase in litigation will impose precisely the burdens on prosecutors – in terms of both time and money – that the doctrine of absolute immunity is intended to preclude.

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[1] Pursuant to Rule 37.2, counsel for *amici* certifies that counsel of record for all parties received timely notice of its intention to file an *amici curiae* brief at least ten days prior to the due date for the *amici curiae* brief. A letter reflecting petitioners' consent to the filing of this brief is being lodged with the Clerk of the Court. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

Nor is the remedy sought by respondents in this case necessary to deter prosecutorial misconduct. To the contrary, prosecutors who engage in misconduct may be subject to discipline by a variety of institutions, including the prosecutors' offices themselves, state bar associations, and the judges before whom they appear. And in the most extreme cases, prosecutors may themselves face criminal sanctions for their misconduct.

ARGUMENT

I. The petition for certiorari demonstrates that certiorari is warranted because the two issues raised by petitioners – whether a criminal defendant's "substantive due process" rights are violated by the improper gathering of evidence and whether prosecutors are absolutely immune from liability for introducing that evidence against a criminal defendant at trial – arise frequently in litigation. *Amici* are aware of still other similar cases that demonstrate the recurring importance of the question presented. The fact that the allegations in this case are not outliers – but rather represent a common tactic for evading settled principles of absolute immunity – reinforces the conclusion that this Court's intervention is warranted.

In *Clanton v. Cooper*, 129 F.3d 1147 (1997), for example, the Tenth Circuit allowed a Section 1983 suit to proceed when the plaintiff alleged that a confession coerced from a witness resulted in the plaintiff's wrongful imprisonment. The court of appeals explained that the plaintiff could "contest the voluntariness of [the witness's] confession not based on any violation of the [witness's] constitutional

rights, but rather as a violation of her own Fourteenth Amendment right to due process." *Id.* at 1158. And in *Fox v. Tomczak*, No. 04 C 7309, 2006 WL 1157466, at *1 (N.D. Ill. Apr. 26, 2006), the court rejected a prosecutor's claim of absolute immunity and allowed a due process claim under Section 1983 to proceed, explaining that "[s]everal other circuit courts of appeal have found that there is a clearly established constitutional due process right not to be subjected to prosecution on the basis of false evidence that was deliberately fabricated by the government." *Id.* at *2 (citing Second Circuit's decision in *Zahrey v. Coffee*, 221 F.3d 342 (2000), along with decisions of the Ninth, First, Fourth, and Eighth Circuits); *see also, e.g.*, *Richir v. Village of Fredonia, N.Y.*, No. 05-CV-076, 2008 U.S. Dist. LEXIS 54012, at *2 (W.D.N.Y. July 14, 2008) (citing *Zahrey*, denying prosecutors' motion to dismiss with regard to claim that prosecutors "manufactured false and misleading evidence against her in violation of her right to due process").

Indeed, a district court in Michigan very recently considered – and denied absolute immunity in – a case virtually on all fours with this one. In *Koubriti v. Convertino*, No. 07-13678, 2008 U.S. Dist. LEXIS 107423, at *1 (E.D. Mich. Dec. 3, 2008), the court denied a motion to dismiss by a former Assistant U.S. Attorney accused by a former defendant of withholding exculpatory evidence and fabricating evidence. In so doing, the court rejected the defendant-prosecutor's "contention that it is only the use of this evidence, not its procurement that violates [the defendant's] substantive due process rights." Instead, the court explained, "[i]mmunity cannot

extend to actions by a prosecutor that violate a person's substantive due process rights by obtaining, manufacturing, coercing or fabricating evidence before filing formal charges, even if the subsequent use of that evidence is protected by absolute immunity." *Id.* at *14.

II. The court of appeals' ruling, if not reversed, will produce several entirely predictable negative consequences on ongoing prosecutorial efforts. First and foremost, it will lead to an increase in litigation against prosecutors, as criminal defendants will seek to circumvent the absolute immunity afforded to prosecutors at trial by shoehorning their allegations into claims focused on the allegedly improper procurement of evidence by prosecutors, notwithstanding that their convictions resulted from the prosecutor's use of that evidence at trial. As one district court explained in granting a motion to dismiss in a Section 1983 case alleging that prosecutors in that case (including now-Senator Arlen Specter) had "solicit[ed] and knowingly us[ed] perjured testimony" against a criminal defendant, "[t]o allow such an allegation to defeat the prosecutor's immunity would vitiate the *Imbler* [*v. Pachtman*, 424 U.S. 409 (1976)] holding. Anyone against whom perjured testimony was used could then force the prosecutor to court in a civil damage action simply by reframing the claim to allege that the perjured testimony was solicited." *Tate v. Grose*, 412 F. Supp. 487, 488 (E.D. Pa. 1976). *See also Weinstein v. Mueller*, 563 F. Supp. 923, 927 (N.D. Cal. 1982) (in case brought against then-AUSA Robert Mueller, who subsequently served as director of the FBI, citing *Tate* and finding "no difference here

between the knowing use of perjured testimony and the solicitation of it. If prosecutorial immunity did not cover the latter as well as the former, the protections of *Imbler* would disappear simply by the addition of another stock allegation.").

The inevitable consequence of the prospect of greater civil liability will be the chilling of the essential exercise of wholly constitutional efforts to prosecute criminal defendants. In the course of their daily work, prosecutors are frequently required to make dozens of decisions related to the prosecution of their caseload. As this Court has acknowledged, the prospect that a prosecutor will face liability for these decisions creates "the possibility that [the prosecutor] would shade his decisions instead of exercising the independence of judgment required by his public trust." *Imbler*, 424 U.S. at 423; *see also id.* at 424-25 ("A prosecutor is duty bound to exercise his best judgment . . . . The public trust of the prosecutor's office would suffer if he were constrained in making every decision by the consequences in terms of his own potential liability in a suit for damages."). If this occurs, "[t]he work of the prosecutor would . . . be impeded and we would have moved away from the desired objective of stricter and fairer law enforcement." *Id.* at 424 (citing *Pearson v. Reed*, 44 P.2d 592, 597 (Cal. App. 1935)). Indeed, the work of a prosecutor would be completely stymied if a defendant could file suit claiming a violation of civil rights whenever prosecutors seek to convince reluctant witnesses to testify notwithstanding efforts by the defendant to intimidate them – efforts that are unfortunately all too common in cases involving, for example, gangs or domestic violence.

An increase in litigation will also impose significant burdens on prosecutors in terms of both time and money – precisely the burdens that absolute immunity is intended to remove. In *Imbler*, 424 U.S. at 425, this Court reasoned that absolute immunity was appropriate because, "if the prosecutor could be made to answer in court each time such a person charged him with wrongdoing, his energy and attention would be diverted from the pressing duty of enforcing the criminal law." Indeed, this Court recognized, absolute immunity was particularly appropriate for prosecutors because "suits that survived the pleadings would pose substantial danger of liability even to the honest prosecutor," who "would face greater difficulty in meeting the standards of qualified immunity than other executive or administrative officials" because he "frequently act[s] under serious constraints of time and even information" and thus "inevitably makes many decisions that could engender colorable claims of constitutional deprivation. Defending these decisions, often years after they were made, could impose unique and intolerable burdens upon a prosecutor responsible annually for hundreds of indictments and trials." *Id.* at 425-26.

III. Contrary to respondent McGhee's assertion that "bad police and bad prosecutors are held accountable in civil rights cases like this one or not at all," McGhee BIO 20, the remedy sought by respondents (and upheld by the Eighth Circuit in this case) is not necessary "to deter objectionable prosecutorial conduct," because there are other "means more narrowly tailored to" do so. *United States v. Hasting*, 461 U.S. 499, 506 (1983). *Compare*

also, e.g., McGhee BIO 19 (positing that "[p]rosecutors would be free to fabricate evidence during criminal investigations because they would know there was virtually no possibility of ever being punished for it").

a. First, as the United States has recently explained, "[p]rosecutorial offices . . . often have their own internal mechanisms to address prosecutorial misconduct and ensure that prosecutors, including supervisors, meet the highest standards of ethical misconduct." Br. *Amicus Curiae* of U.S., *Van de Kamp v. Goldstein* (No. 07-854) at 32. At the federal level, the Department of Justice's Office of Professional Responsibility ("OPR") has responsibility for investigating "allegations of professional misconduct made against Department of Justice (DOJ) attorneys where the allegations relate to the exercise of the attorney's authority to investigate, litigate, or provide legal advice," including allegations similar to those at issue in this case. U.S. Dep't of Justice, Office of Professional Responsibility Annual Report: 2005, at 1 ("OPR 2005 Annual Report") (OPR investigates allegations that include violations of *Brady v. Maryland*, 373 U.S. 83 (1963), *Giglio v. United States*, 405 U.S. 150 (1972), and Federal Rule of Criminal Procedure 16, as well as allegations of improper coercion or intimidation of witnesses); *see also Hasting*, 461 U.S. at 506 n.5 (1983) ("Here, for example, the court could have dealt with the offending argument by asking the Department of Justice to initiate a disciplinary proceeding against him . . . . "). OPR – which is made up of twenty-two permanent career attorneys and several detailees from various U.S. Attorneys' offices – operates

independently within the Department of Justice, reporting directly to the Attorney General. *See* U.S. Dep't of Justice, *Office of Professional Responsibility*, *available at* www.usdoj.gov/opr/ (visited Mar. 19, 2009).

OPR's investigations of prosecutorial misconduct may arise from complaints from a variety of sources, including private attorneys and parties, judicial referrals, and self-reporting by Department employees. *See* OPR 2005 Annual Report 5. OPR itself also conducts regular searches of electronic databases to locate any judicial criticism of federal prosecutors. OPR reports the results of its investigations to the Office of the Deputy Attorney General and the relevant DOJ management officials, including "a recommended range of discipline" for attorneys who are found to have engaged in misconduct. DOJ officials are then responsible for imposing "any disciplinary action that may be appropriate," although they cannot depart from OPR's recommendations without advance notification to the Office of the Deputy Attorney General. *Id.* at 2. In the cases in which OPR found professional misconduct, disciplinary action that included suspensions and reprimands was initiated in nearly two-thirds of them.

b. At the federal, state, and local levels, prosecutors are also subject to discipline by state bar associations. As this Court explained in *Imbler*, 424 U.S. at 429, "a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers. These checks undermine the argument that the

imposition of civil liability is the only way to insure that prosecutors are mindful of the constitutional rights of persons accused of crime."

When OPR concludes that federal prosecutors have engaged in misconduct – by finding either intentional misconduct or "that a subject attorney acted in reckless disregard of a professional obligation or standard," it automatically notifies "the bar counsel in each jurisdiction in which an attorney found to have committed professional misconduct is licensed," OPR 2005 Annual Report 3, of both the finding and any discipline imposed. OPR will also respond to "the bars' requests for additional information on those matters." The bar association (which, of course, could also learn of potential misconduct by federal prosecutors from independent sources, including the bar counsel's own review of judicial opinions) may conduct its own investigation of the misconduct, and may also decide to impose its own discipline.

State prosecutors are similarly subject to discipline by state bar associations for their misconduct. In Iowa, for example, petitioners as practicing attorneys were subject to several applicable Iowa Court Rules, including Rule 32.3.8(a) (prohibiting prosecutor from prosecuting a charge that he knows is not supported by probable cause) and Rule 32.3.8(d) (violation of Iowa Rules to knowingly fail to disclose exculpatory evidence). There is no statute of limitations for the filing of an attorney disciplinary complaint, which may be filed by "any person, firm, or other entity," Iowa Ct. R. 34.1, with the Iowa Supreme Court Attorney Disciplinary Board – which may also initiate an

investigation or disciplinary action on its own, Iowa Ct. R. 34.5. Possible sanctions could include a private admonition, public reprimand, or suspension or revocation of the prosecutor's law license. Iowa Ct. Rs. 34.11, 35.9, 36.16. *See, e.g.*, *Iowa S. Ct. Att'y Disciplinary Bd. v. Borth*, 728 N.W.2d 205 (Iowa 2007) (publicly reprimanding assistant county attorney with no prior ethical violations for misconduct that included violation of rule prohibiting prosecutors from undertaking criminal defense work and violating ethical rules in negotiating plea bargains); *Iowa S. Ct. Att'y Disciplinary Bd. v. Barry*, No. 08-1214, 2009 WL 415528, at *12 (Iowa Feb. 20, 2009) (law license of county attorney – who had already been removed from office – suspended indefinitely, with no possibility of reinstatement for one year; misconduct included making a series of illegal plea agreements that required defendants to donate money to sheriff's office, which then used money to "purchase weapons for the department, to pay [attorney's] cell phone bills, and to purchase a vehicle for [his] use").[2]

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[2] *See also* John Stevenson, *Nifong May Be Ouster No-Show*, Durham Herald-Sun, June 28, 2007, at A1 (prosecutor in Duke lacrosse case stripped of law license by North Carolina state bar); Dee J. Hall, *Clash of Lawyers Coming To A Head*, Wis. St. J., July 8, 2007, at A1 (prosecutor under investigation by state authorities for lying and withholding evidence from defense; could face public reprimand); Bill Moushey, *He's Free After 4 Hard Years*, Pittsburgh Post-Gazette, Dec. 2, 2006, at A1 (fired district attorney also reported to state disciplinary board for investigation).

c. Prosecutors may also face a variety of additional sanctions as a consequence of their misconduct. First and foremost, they may lose their jobs. This is true not only for line attorneys, but also for the chief prosecutor in a jurisdiction, who may be subject to removal from office under state law or – if elected – may be defeated at the polls. *See, e.g.*, Bill Moushey, *He's Free After 4 Hard Years,* Pittsburgh Post-Gazette, Dec. 2, 2006, at A1 (assistant district attorney fired for misconduct during cross-examination of key witness; charges against defendant dropped); *Iowa S. Ct. Att'y Disciplinary* Bd. *v. Barry*, No. 08-1214, 2009 WL 415528, at *1 (Iowa Feb. 20, 2009) (county attorney removed by county district court in light of finding that attorney had "breached his duties knowingly and with a purpose to do wrong"); John Stevenson, *Nifong May Be Ouster No-Show*, Durham Herald-Sun, June 28, 2007, at A1 (reporting on effort to seek removal of Duke lacrosse prosecutor under North Carolina law permitting chief judge in a jurisdiction to remove district attorneys for certain types of misconduct).

Second, prosecutors may be sanctioned by the judges before whom they appear. *See, e.g., United States v. Hasting*, 461 U.S. 499, 506 n.5 (1983) ("The Court also could have publicly chastened the prosecutor by identifying him in his opinion."). Indeed, in the recent trial of Senator Ted Stevens, the district court held several federal prosecutors in contempt for their failure to turn over documents relating to alleged prosecutorial misconduct. Del Quentin Wilber, *6 Prosecutors No Longer Part Of*

Legal Team in Stevens Case, Wash. Post, Feb. 18, 2009, at A6.[3]

Third, in truly egregious cases, prosecutors may themselves face criminal sanctions for their misconduct. One recent example is the case of four Muslim men accused of being part of a "sleeper" terrorist cell in Detroit. When allegations of prosecutorial misconduct that included suppression of evidence later surfaced, the Department of Justice not only sought dismissal of all terrorism charges against the defendants, but it also brought criminal charges against the prosecutor himself for conspiring "to present false evidence at trial and to conceal inconsistent and potentially damaging evidence from the defendants." Eric Lichtblau, *Ex-Prosecutor In Terror Inquiry Is Indicted*, N.Y. Times, Mar. 30, 2006, at A18.

d. There is no evidence that the further prospect of civil liability is necessary to deter prosecutorial misconduct. A defendant who believes that he has been the subject of unlawful or unconstitutional actions by a prosecutor has complete and unfettered access to the existing disciplinary regimes applicable to state and local prosecutors. State officials, state bars, and judges all stand ready to ensure the proper functioning of the prosecutorial system. By contrast,

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[3] Those prosecutors were subsequently removed from the government's legal team addressing misconduct allegations, and OPR is apparently investigating the misconduct allegations and contempt findings. Mike Scarcella, *Sealed Court Records, Transcripts Released in Stevens Case*, The BLT: The Blog of Legal Times, Feb. 18, 2009.

the prospect that a prosecutor's interactions with a witness may later be second-guessed by a civil jury – often many years later, when recollections have failed and relevant evidence is no longer available – poses a direct threat to the orderly prosecutorial function.

CONCLUSION

For the foregoing reasons, as well as those outlined in the petition, certiorari should be granted. Alternatively, this Court should call for the views of the Solicitor General.

Respectfully submitted,

Amy Howe
HOWE & RUSSELL, P.C.
7272 Wisconsin Ave.
Suite 300
Bethesda, MD 20814

Thomas C. Goldstein
(Counsel of Record)
AKIN, GUMP, STRAUSS,
HAUER & FELD LLP
1333 New Hampshire
Ave., NW
Washington, DC 20036
(202) 887-4000

March 23, 2009